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No. 482

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

LOCAL NO. 207, OF INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, WILLIAM E. THOMAS, HENRY GORGAS, FLOYD BECK, EUGENE ROBERTS AND JAMES CASTNER

Petitioners.

v.

JACOB PERKO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITIONERS' REPLY BRIEF

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The respondent's brief makes certain statements which perhaps require brief comment.

1. Respondent says that the "tort complained of" in this case was only wrongful interference with his employment as a superintendent, and that a superintendent, as distinguished from a "foreman" or "pusher" (R. 110, 117), is a supervisor under the National Labor Relations Act. On this factual premise, respondent bases his legal argument that the Act does not regulate the union action complained of here and would have afforded him no protection.

Both the factual premise and the legal conclusion are incorrect.

As we pointed out in our reply brief on the petition for certiorari, the complaint (R. 2), the respondent's testimony (R. 67), his lawyer's testimony (R. 78), the trial judge's instruction to the jury (R. 164-65, 170-71), and the opinion of the Ohio Court of Appeals (R. 182-83) all make it clear that respondent sought and recovered damages for loss of employment as *both* a superintendent and a foreman. And respondent does not argue that a foreman (or "pusher") is not an employee under the Act, entitled to all of its protections. (See our original brief, pp. 20-26).

Even if—contrary to the record—respondent had sought recovery only for loss of work as a supervisor, the consequence urged by respondent would not follow. Respondent's assertion that a supervisor "does not have recourse to any protective measures of the National Labor Relations Act" (Br. 15) is simply not true.

It is true that supervisors are excluded from the definition of "employee" under the Act, and therefore their rights under the Act are not the same as those of employees. But it does not follow that they have *no* rights.

The reason that the right of employees to organize bargain collectively, and engage in concerted activity was withheld from supervisors was that Congress wanted to give employers a free hand in hiring, firing, or otherwise dealing with supervisors, as the legislative history cited in respondent's brief makes clear (Br. 5). It was in furtherance of precisely this same policy that Congress, in Section 8(b)(1)(B) of the Act, specifically made it an unfair labor practice for a union to interfere with an employer's selection of supervisors. There can be no question that a supervisor, who is discharged as a result of union action which violates Section 8(b)(1)(B), would have recourse to the Board for appropriate relief, including back pay. See Section 10, 29 U.S.C. § 160.

Moreover, despite the statutory policy favoring maximum employer freedom in hiring and firing supervisors, the Board has held that it is an unfair labor practice for an employer to discharge a supervisor because of his refusal to participate, or participate with sufficient vigor, in the employer's antiunion campaign. The discharge of a supervisor in such circumstances, the Board has held, is unlawful because it coerces nonsupervisory employees as well, since it leads them "reasonably to fear that the [employer] would take similar action against them if they continued to support the Union." *Talladega Cotton Factory, Inc.*, 106 N.L.R.B. 295, 297 (1953), *enforced*, 213 F. 2d 209 (5th Cir. 1954). See also *General Engineering, Inc.*, 131 N.L.R.B. 648 (1961), *enforcement denied on other grounds*, 311 F. 2d 570 (9th Cir. 1962); *NLRB* v. *Brookside Industries, Inc.*, 51 L.R.R.M. 2148 (4th Cir. 1962); *NLRB* v. *Better Monkey Grip Co.*, 243 F. 2d 836 (5th Cir. 1957), *cert. denied*, 355 U.S. 864 (1957). The Board has ordered reinstatement of the supervisor with full back pay in these cases. As we pointed out in our original brief, the same result would seem to follow, *a fortiori*, where the union obtains the discharge of a supervisor because of his failure to abide by union rules. Not only would such action have a similarly coercive effect on nonsupervisory employees, but no countervailing statutory policy is involved where it is the union, rather than the employer, which is responsible for the supervisor's discharge.

2. Respondent states that there is no basis in the record for assuming that the union's alleged interference with his employment was, as in *Radio Officers* v. *NLRB*, 347 U.S. 17 (1954), based on his violation of a union rule.[1] In mak-

[1] If the union had arbitrarily prevented the respondent from working for some reason other than his violation of a union rule, the question would arise as to whether even such conduct is an unfair

ing this assertion, respondent is disavowing the very theory on which he tried his case. It was respondent who introduced in evidence the fact that there had been a jurisdictional dispute between the ironworkers union and the boilermakers union in late 1953 (R. 23), and the fact that in early December, the same week the alleged tort was committed, the respondent had been tried and convicted for violating the union's rule against instructing boilermakers (R. 49). It was respondent's witness—and the only employer witness whose testimony in any way supported respondent's case—who stated on direct examination that in the "early part of December" representatives of the union told him "that Mr. Perko was educating the boilermakers in their particular work; so that they felt they weren't going to take orders from him any more" (R. 27). At no

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labor practice. The NLRB, in a recent decision, has held that "a statutory bargaining representative, and an employer also respectively violate Section 8(b)(2) and 8(a)(3) when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee." *Miranda Fuel Co.*, 140 N.L.R.B. No. 7, 51 L.R.R.M. 1584, 1587 (1962). Thus the Board has now taken the position that it is an unfair labor practice for a union to injure an employee in his employment for any arbitrary reason, whether it is related to the employee's actions as a union member or not. While we agree with the Board that unions have a duty under the Act to represent employees fairly, see *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953); *Syres* v. *Oil Workers*, 350 U.S. 892, *reversing per curiam* 223 F. 2d 739 (5th Cir. 1955), we are doubtful that that duty is enforceable through unfair labor practice proceedings. On the other hand, since the Board has so held, the question would appear to be sufficiently "arguable" to preclude state court jurisdiction. But the Court need not reach that question in this case, since it is clear that it is an unfair labor practice for a union to injure an employee in his employment because he violated a union rule, *Radio Officers* v. *NLRB*, 347 U.S. 17 (1959), and that is what is involved here.

time did respondent suggest that there was any other reason for the union's alleged action. It is too late for him to do so now.

Respectfully submitted.

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